Nos. 84-1633 & 84-1641

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In The

Supreme Court of the United States

October Term, 1984

PHILADELPHIA ELECTRIC COMPANY,
Petitioner,

v.

BLACK GRIEVANCE COMMITTEE, NATIONAL LABOR RELATIONS BOARD, and INDEPENDENT GROUP ASSOCIATION,

Respondents.

AND

INDEPENDENT GROUP ASSOCIATION,
Petitioner,

v.

BLACK GRIEVANCE COMMITTEE, NATIONAL LABOR RELATIONS BOARD, and PHILADELPHIA ELECTRIC COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF BLACK GRIEVANCE COMMITTEE TO PETITIONS FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

Respondent Black Grievance Committee ("BGC") accepts most of the statement of the case presented by petitioners Philadelphia Electric Company ("PECO") and Independent Group Association ("IGA") with the exception of the argument supporting the petitions contained within their respective statements of the case. BGC, however, does wish to add a few points to clarify the record.

The BGC was formed seventeen years ago due to the perception by black employees at PECO that the IGA was not responsive to black employees' claims of racial discrimination and other problems affecting black workers (A25).* Since the IGA was not an exclusive bargaining representative, its members desiring to assert claims of racial discrimination could not force the IGA to handle their grievances or obtain greater attention to alleged discriminatory practices in the event that the IGA was reluctant to proceed (A9-10). The BGC thus arose to direct attention to alleged racially discriminatory practices which BGC members wished to have addressed within the grievance system established by PECO for the benefit of all its employees.

PECO did permit the BGC to represent its members in individual grievance proceedings for a period of ten years until September 12, 1978 when PECO reversed its earlier position and prohibited BGC from representing its membership in grievance proceedings concerning any issue (A23-24). Thus, for a period of ten years PECO permitted BGC members to have their freely

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* In citing to the documents in the Appendix, BGC will cite the Appendix submitted by PECO while noting that both Appendices contain the same documents though with different pagination.

chosen labor organization, BGC, represent their interests in individual grievance proceedings before it abruptly changed its position. Thereafter, employees, not members of IGA, or who chose not to be represented by IGA in grievance proceedings, could be represented by a single co-employee serving in a representative capacity merely as an interested friend and not as the representative of any group or labor organization.

PECO thus forced employees to choose between labor organization representation by IGA or individual employee representation without the assistance of any labor organization (A11).

After permitting BGC to represent its members for ten years, PECO justified its abrupt refusal to permit further BGC representation claiming that to do so would permit racial polarization of the work force where black and white groups would represent the interests of their respective members (A5, 23, 24). Though this rationale appears neutral on its face, since the IGA had an all white executive board and the sole right to represent employees as a labor organization, black employees desiring to assert claims which the IGA did not support were deprived of labor organization assistance by the favoritism given IGA and the ban on representation by BGC. BGC therefore argued that PECO committed an unfair labor practice violating Section 8(a)(1) of the National Labor Relations Act by refusing BGC permission to represent its members on the grounds of the race of the leadership and membership of BGC which had a nexus to interference with Section 7 rights. This claim founded on racial discrimination was asserted in addition to the claim under Section 8(a)(1) of interference with Section 7 rights through disparate treatment and favoritism and support for the IGA.

On the unique facts presented by this case, the Court of Appeals held that when an employer creates a grievance mechanism

and then accords one non-majority employee group privileged status over another non-majority group, encouraging membership in the former while discouraging it in the latter, it unlawfully interferes with the Section 7 rights of employees to band together for mutual assistance in the group of their free choice (A11). The court noted that otherwise employees would be forced, if they desired group leverage against their employer, to join employee groups favored by the employer despite the employees' belief that the favored group will not be supportive of their interests and cannot be legally forced to fairly represent their interests. *Id.*

PECO and IGA have filed petitions for a writ of certiorari from this decision, but the NLRB has chosen not to seek review of the Court of Appeals decision.

ARGUMENT

I.

The unique factual circumstances of this case resulted in a decision, for which the NLRB does not seek review, that is consistent with prior decisions of the Supreme Court.

Petitioners invite this Court to exercise its discretion to determine this case on the merits though myriad reasons exist for the Court to decline the invitation. First, the unique factual circumstances of this case suggest that the fact pattern is *sui generis*. Second, the NLRB has not chosen to seek review though it was the respondent below. Third, the NLRB did not give full consideration to the case prior to review by the Court of Appeals and issued a decision adopting the opinion of an Administrative Law Judge without independent analysis by the Board. Fourth, the decision of the Court of Appeals is consistent with the purposes of the NLRA and previous decisions of this Court. Fifth, petitioner PECO observes that the Third Circuit is "the first court of appeals

to confront the issue directly" (Petition for Certiorari at 12). Sixth, there are no decisions by the NLRB or other courts of appeals which are inconsistent on the precise issue presented concerning the respective rights of members of non-majority labor organizations in a grievance system created by the employer.

The uniqueness of this case lies in the fact that PECO permits a forty year old non-majority labor organization to represent its membership in an employer-created grievance system while not permitting a seventeen year old non-majority labor organization to represent its membership though it previously permitted the younger group the opportunity to represent its members for a period of ten years. The uncommon posture in which the issues are presented makes this case an undesirable vehicle for this Court to determine principles of labor law which have not been discussed by other circuits and which did not receive a full measure of discussion by the NLRB which would assist review by this Court.

The application by the Court of Appeals of Section 7 and Section 8(a)(1) of the NLRA to the unique facts of the case is consistent with prior decisions of this Court and is not inconsistent with the decisions of other circuits. Section 7 guarantees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activity for . . . mutual aid or protection. . . ." 29 U.S.C. §157. Section 8(a)(1) of the Act enforces the rights guaranteed by Section 7 by declaring it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the right guaranteed in Section 157. . . ." 29 U.S.C. §158(a)(1). Though BGC does not have Section 9(a) status as the exclusive bargaining representative, the actions of BGC members in banding together to present their grievances to PECO constitute concerted action protected by Section 7 of the Act. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

Since BGC has never been recognized or certified as the exclusive bargaining representative, PECO has no independent obligation to permit BGC to represent members in grievance proceedings. *Morrisville Cotton Mills,* 2 NLRB 952, *modified and enforced,* 94 F.2d 61 (4th Cir. 1938). The members only agreement with IGA permitting representation in grievance proceedings is not, standing by itself, an unfair labor practice. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938). However, when PECO grants members only recognition to IGA for grievance administration but denies and refuses to permit corresponding rights to BGC on behalf of its membership, PECO has engaged in disparate treatment tending to promote membership in IGA and inhibit membership in BGC. *Berkshire Knitting Mills*, 46 NLRB 955, *modified and enforced*, 139 F.2d 134 (3rd Cir. 1943), *cert. denied*, 322 U.S. 747 (1944); *Sunbeam Corporation,* 99 NLRB 546 (1952); *Carborundum Company,* 36 NLRB 710 (1941). Disparate treatment inhibiting Section 7 rights constitutes an unfair labor practice under Section 8(a)(1). *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949); *NLRB v. Northeastern University*, 601 F.2d 1208 (1st Cir. 1979); *Trustees of Columbia University,* 225 NLRB 185 (1976).

Disparate treatment in the use of company bulletin boards may constitute unlawful interference. *Midwest Stock Exchange Inc. v. NLRB,* 635 F.2d 1255 (7th Cir. 1980); *Union Carbide Corp. v. NLRB*, 714 F.2d 657 (6th Cir. 1983). Restrictions on solicitation of employees for union purposes when other solicitation is permitted under similar circumstances may violate Section 8(a)(1). *Montgomery Ward and Co., Inc. v. NLRB*, 692 F.2d 1115 (7th Cir. 1982); *Midwest Stock Exchanger Inc. v. NLRB, supra.* Hospital rules preventing employee solicitation for union membership during non-working time in non-working areas constitutes interference with the right of self-organization protected by Section 7. *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978). Company rules prohibiting employee wearing of union insignia

in the absence of special circumstances constitutes unlawful interference with Section 7 rights. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Larand Leisurelies, Inc. v. NLRB*, 523 F.2d 814 (6th Cir. 1975).

The import of these disparate treatment cases is that an employer unlawfully interferes with Section 7 rights when it refuses to permit organizational and other activities of members of a labor organization when it permits other organizations or groups to conduct similar activities. Thus, petitioners are correct that, standing alone, an act utilizing economic weapons which may encourage or discourage union membership is not an unfair labor practice. *NLRB v. Brown*, 380 U.S. 278 (1965); *American Shipbuilding Co. v. NLRB*, 380 U.S. 300 (1965). But here the discouragement of BGC membership comes in a factual circumstance where the employer has voluntarily established a grievance system and permitted one non-majority labor organization the exclusive right to represent its members in the grievance system while denying the right of representation to another non-majority labor organization. It is thus the disparate treatment of employees engaging in protected concerted activities together with the resulting encouragement and discouragement of membership in the two labor organizations which lies at the heart of this case. Coupled with this disparate treatment is the coercion and interference with employees' right to free choice of their labor organization through the employer's grant of the exclusive right to represent members in grievance proceedings to the favored IGA. This coercion of selection of labor organizations for employees desiring group representation in the grievance system, exists while the employee has no right to compel the non-majority IGA to fairly represent the employee's interests. *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50, 64 (1975); *Vaca v. Sipes,* 386 U.S. 171 (1967).

Petitioners have misstated the clearly limited holding of this case dependent upon its unique facts by claiming that the Court of Appeals decided that employers must deal equally and identically with every non-majority labor organization. The limited holding of the Court of Appeals depends upon the employer's creation of a grievance system where employees cannot claim a legal duty of fair representation and where the employer grants an exclusive right to represent members to only one non-certified labor organization.

Due to the unique factual circumstance of this case, the decision of the Court of Appeals will not impact upon the experimentation with alternative forms of employee organizing and representation as suggested by petitioners. In any event, if petitioners are correct that many new forms of labor organizations and modes of employee representation are coming into existence, the adjustment of the respective rights of employees in the variety of labor organizations contemplated should not be determined by this Court prior to any review by the NLRB of these new forms of employee representation and where no other court of appeals has considered the myriad issues created by a host of yet undefined alternative modes of self-organization and employee representation.

Further, since the NLRB chose neither to file a Petition for Writ of Certiorari nor to issue its own decision on this case, but rather, chose to adopt the decision of an Administrative Law Judge, it is clear that this case does not present the type of case in which this Court should attempt to determine the rights of employees without an exclusive bargaining representative where they have formed together to seek mutual aid and protection of their interests through concerted action under Section 7 but where the employer engages in differential treatment of the budding labor organizations.

In the posture of this case, this Court should decline the invitation to finally determine principles of federal labor law without prior full consideration by the NLRB and the various courts of appeals.

II.

The Court of Appeals applied the well established principle that NLRB legal conclusions are not entitled to the usual deference when they rely upon an erroneous legal foundation.

Both petitioners seek review of the Court of Appeals decision claiming that it applied an impermissible standard of review of NLRB legal conclusions. Though petitioners cite a number of cases applying different formulations of the standard of review applicable in different circumstances, the Court of Appeals in the instant case applied a very traditional and well established principle by not according the legal conclusions of the NLRB their usual deference since they were inconsistent with the Act and rested upon an erroneous legal foundation. *NLRB v. Yeshiva University*, 444 U.S. 672, 691 (1980); *Ford Motor Co. v. NLRB,* 441 U.S. 488, 497 (1979); *NLRB v. Brown*, 380 U.S. 278, 292 (1965); *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105 (1956).

Though the initial language by the Court of Appeals in applying the appropriate legal standards may suggest that the court was adopting a broader scope of review (A6), analysis of the entire decision of the court demonstrates that it merely applied the traditional erroneous legal foundation standard in reversing a decision of the NLRB. The Board silently adopted the legal analysis of the Administrative Law Judge who interpreted the effect of Section 7 and Section 8(a)(1) of the Act in a manner inconsistent with decisions of the courts and the Board itself. Specifically, the Administrative Law Judge held that Section 7 rights were limited to situations involving a restraint upon "employees from

joining, forming, or assisting a labor organization or organizations with a view towards obtaining Section 9(a) status" (A44). The Court of Appeals held that the Administrative Law Judge "erred in not recognizing that the protection of Section 7 goes *beyond* selection of an exclusive bargaining representative, and includes the right to be free from interference with *any* organizational activity" (A9). The court held that reading of the rights protected by Section 7 and enforced through Section 8(a)(1) was too narrow and frustrated fundamental principles of the Act permitting employees to band together to address specific grievances even when they do not seek Section 9(a) exclusive bargaining status (A10).

The court therefore held that the NLRB decision was premised upon an erroneous legal foundation not supported by decisions of the Board or the courts. When an NLRB decision is premised upon an erroneous legal foundation, the cases previously cited require withdrawal of the usual deference accorded the Board's interpretation of the NLRA due to the inconsistency of its position with the Act.

Since the standard of review applied by the court follows this traditional standard of review, there is no reason for this Court to review the application of this well established principle.

CONCLUSION

For the above and foregoing reasons, the Court should deny the petitions for writ of certiorari filed in both of these cases.

Respectfully submitted,

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